

The claimant sought and received additional treatment for his injuries on several separate occasions after the settlement. On June 2, 2005, claimant filed an application

for review and modification which listed the reasons modification was sought: "Additional medical treatment and increase in disability." But at the review and modification hearing held on August 25, 2005, the claimant's attorney clarified the reasons for the hearing were to obtain reimbursement for out-of-pocket medical expenses claimant had incurred, payment of outstanding medical expenses and attorney fees. There was no request for an increased award of permanent partial disability compensation.

After claimant's testimony at the hearing, claimant's attorney further requested that respondent be ordered to provide a second pair of prescribed orthotic shoes which claimant had not received. At the conclusion of the hearing, the ALJ set terminal dates and requested claimant provide copies of the prescriptions for the footwear.

On August 31, 2005, the claimant's attorney sent the ALJ a letter, with the prescriptions attached as requested. This was the conclusion of the review and modification hearing. The letter requested the ALJ to issue the decision and further noted that a check for \$1,059.60 had been received which eliminated that portion of claimant's request for reimbursement of out-of-pocket expenses.

On October 5, 2005, the ALJ entered an Order On "Review & Modification" which determined that respondent provide claimant two new pairs of orthotic shoes "along with the other expense requested by [c]laimant."

Upon receipt of the October 5, 2005 Order on "Review & Modification" the claimant sent a letter dated October 14, 2005, to the ALJ noting that there were three additional issues raised at the review and modification hearing which claimant alleged the ALJ had not decided. The issues were listed as claimant's reimbursement for out-of-pocket expenses, payment of outstanding medical expenses and attorneys fees. The letter concluded that it would be acceptable to both parties for the ALJ to issue an Order Nunc Pro Tunc addressing those issues.

Apparently, out of caution, the claimant then filed an application for board review of the ALJ's October 5, 2005, Order on "Review & Modification."

On November 16, 2005, the ALJ entered an Order Nunc Pro Tunc which ordered respondent to pay the outstanding medical expenses, subject to the limitations of the medical fee schedule, if any, the reimbursement of the claimant's out-of-pocket medical expenses and payment of claimant's attorney fee expenses.

As previously noted, the claimant requested review of the October 5, 2005, Order on "Review & Modification." The claimant requested the Board to enter orders for the requested reimbursement and medical expenses as well as attorney fees.

The respondent filed an application for Board review of the November 16, 2005, Order Nunc Pro Tunc. Respondent noted that the reimbursement of claimant's out-of-

pocket medical expenses had been reimbursed and was no longer an issue. Respondent argues the order for payment of medical expenses and allowance of attorney fees was improper because there is no statutory authority to order payment of those expenses pursuant to a review and modification proceeding. The respondent further argued that the original Order On "Review & Modification" was appropriate.

Conversely, claimant argues the proceeding could be treated as either a hybrid or combination between a proceeding for post-award medical or a review and modification proceeding or both and requests the Board to affirm the ALJ's Order Nunc Pro Tunc.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant's uncontradicted testimony established that he injured his right leg and ankle on two separate occasions while working for the respondent. Both claims were settled with future medical left open. After the claims were settled, Dr. Susan Bonar was designated as claimant's authorized treating physician. Dr. Bonar recommended surgery but after additional testing the doctor decided not to proceed with the surgery. The cost of the testing was \$9,289.44.<sup>1</sup> Dr. Bonar also prescribed shoes, inserts and support stockings for claimant.

The claimant attempted to fill the prescription at Hanger Orthotics but Hanger Orthotics could not obtain authorization from the respondent. So, claimant purchased the shoes and inserts and later paid for adjustments to the orthotics as well as lotion to keep his leg moist. The lotion had been recommended when claimant had developed open wounds because he was having difficulties obtaining the recommended support stockings in a timely fashion. The claimant's total out-of-pocket expenditures for these items amounted to \$1,073.60.<sup>2</sup>

Dr. Bonar had indicated claimant needed new shoes and inserts every calendar year. Dr. Bonar prescribed that claimant receive a pair of tennis shoes and a pair of dress shoes so that he could alternate them on a day-to-day basis.<sup>3</sup> The claimant explained that although Dr. Bonar had prescribed two pair of shoes he had only received one pair which he had paid for himself.

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<sup>1</sup> R.M.H. Trans., Ex. 2.

<sup>2</sup> *Id.*, Ex. 1.

<sup>3</sup> *Id.*, Ex. 3.

After the review and modification hearing held on August 25, 2005, the ALJ issued a Review & Modification Decision which provided:

On this application for Review & Modification set for August 25, 2005, it appears to be more of a request for medical treatment and provision of prosthetics, at least at present. Following Claimant's testimony and the observation of some of the footwear Claimant has finally obtained himself, tentative terminal dates are established, giving Claimant until September 12th to provide the additional material he needs and the respondent until September 26th to do the same. The attorney fees requested, with the objection voiced by the respondent, are kept under consideration.<sup>4</sup>

As previously noted, on August 31, 2005, the claimant's attorney sent the ALJ a letter, with attached copies of the prescriptions for claimant's shoes and orthotics as requested by the ALJ at the conclusion of the review and modification hearing. The letter requested the ALJ to issue the decision and further noted that a check for \$1,059.60 had been received which eliminated that portion of claimant's request for reimbursement.<sup>5</sup>

On October 5, 2005, the ALJ issued an Order On "Review & Modification" which provided:

On August 25, 2005, a hearing was scheduled for consideration of additional medical expense incurred by Claimant and alleged to result from the injuries that commenced this settled claim. It was held under consideration for the production of a prescription for additional shoes as originally proposed by the currently authorized provider, Susan K. Bonar, M.D. (8/25/05 Trpt., p.17). It has now been added to the file (September 21, 2005) and the detail is not very impressive.

Under the circumstances discussed at the hearing (Id. pp. 66-68 [sic]), it seems the best thing simply to order the primary employer, K-Mart Corporation, to provide 2 new pairs of the shoes prescribed (since the original pair is old now) at its expense, according to an estimate by the prosthetic supplier to be filed first, along with the other expense requested by Claimant and allotted its reimbursement from other interested parties if and when disputes arise. These parties seem to be able to work out their differences but there is no reason the Claimant needs to be in the middle of them.<sup>6</sup>

Although this order did not address the attorney fee issue it did arguably address the remaining issues with the phrase "along with the other expense requested by claimant."

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<sup>4</sup> ALJ Order (Aug. 25, 2005).

<sup>5</sup> The claimant had requested reimbursement of \$1,073.60 for out-of-pocket medical expenses. The reimbursement received did not include the \$14 claimant had spent for lotion for his leg.

<sup>6</sup> ALJ Order (Oct. 5, 2005).

As previously noted, upon receipt of the order the claimant sent a letter to the ALJ noting that there were three additional issues raised at the review and modification hearing which claimant alleged the ALJ had not decided. The issues were listed as claimant's reimbursement for out-of-pocket expenses, payment of outstanding medical expenses and attorneys fees. The letter concluded that it would be acceptable to the parties for the ALJ to issue an Order Nunc Pro Tunc addressing those issues.

As the parties requested, the ALJ issued an Order Nunc Pro Tunc on November 16, 2005, which provided:

Because the order of October 5, 2005 was not considered to be a conclusion of the pending application for Review & Modification, it addressed only the emphasized immediate needs of Claimant for additional orthotic foot wear. The parties now indicate as of October 14, 2005 a willingness to accept an order Nunc Pro Tunc addressing the other needs expressed. This includes the reimbursement of Claimant's out of pocket expense for certain medical needs shown on Ex. 1 of the hearing August 25<sup>th</sup>. The payment for the hospital charges apparently incurred by Mr. Bennett for tests for Dr. Bonar, charges at Baptist Lutheran Medical Center in Atlanta, on November 5, 2003, billed at \$9,289.44 (after the settlement hearing), and attorney fees for Claimant's attorney's Post Award services amounting to 13.5 hours, normally payable at the conclusion of the services, for which \$150.00 an hour appears adequate, also are noted. These should all be allowed, subject only to a limit on the hospital expenses in Ex. 2 to the amount then allowable in our medical fee schedule. (The services were evidently obtained and provided without any application to the Division such as made part of the Settlement Transcript of September 18, 1995 at pp. 9,11,12 and 14).

The respondent does not dispute the findings the ALJ made in the October 5, 2005 Order On "Review & Modification." And because the parties agreed the ALJ should address the remaining issues by an Order Nunc Pro Tunc, it does not appear there are any remaining issues regarding that order.<sup>7</sup>

Respondent requested review of the Order Nunc Pro Tunc and argues the ALJ did not have the authority to issue an award for payment of medical expenses and attorney fees because the proceeding was for review and modification pursuant to K.S.A. 44-528.

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<sup>7</sup> An order nunc pro tunc is typically only appropriate to correct clerical errors in a decision. It is improper to enter a nunc pro tunc to make substantive decisions. In this case the ALJ actually entered three separate orders after the one hearing. And at the request of the parties the ALJ designated his third order a nunc pro tunc even though it could be interpreted as deciding substantive issues raised at the hearing but not decided in the ALJ's prior two orders. The Board considers the last order to be a clarification of the second order's statement that "along with the other expense requested by Claimant" in fact had determined the remaining issues raised at the hearing. Accordingly, the third order did not correct or amend the previous two orders. In either case, pursuant to the parties agreement and the ALJ's intent the Board will treat the last two orders as one.

At the review and modification hearing, the claimant's attorney offered an exhibit which contained an itemization of time spent on the request to obtain the reimbursement of claimant's out-of-pocket expenses and reimbursement of medical expenses. The respondent's attorney objected noting the proceeding was for review and modification and not for post award medical and accordingly, attorney fees would not be appropriate. Respondent's counsel noted:

MR EMERSON: On that, Judge, I would just make a comment, which would be more argument. I don't object to the exhibit going in, but we are here on a review and modification hearing, not a post award medical. So I don't think the attorney's fees would be appropriate at this time.<sup>8</sup>

With regard to attorney fees, K.S.A. 1992 Supp. 44-536(g) provides:

In the event any attorney renders services to an employee or the employee's dependents, **subsequent to the ultimate disposition** of the initial and original claim, and in connection with an **application for review and modification**, a hearing for vocational rehabilitation, a hearing for additional medical benefits, **or otherwise**, such attorney **shall** be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of compensation, the attorney fees shall be paid from such amounts of compensation. **If such services involve no additional award of compensation, the director shall fix the proper amount of such attorney's fees** in accordance with this subsection and such fees shall be paid by the employer.<sup>9</sup> (Emphasis added.)

The Workers Compensation Act provides that an attorney who represents an employee or an employee's dependents is entitled to reasonable attorney fees for services rendered after the ultimate disposition of the initial and original claim. And if those legal services result in no additional award of disability compensation but result in an additional award of medical compensation or other benefits the director (ALJ) shall fix the proper amount of such attorney fees to be paid by the employer.

The review and modification proceeding was clearly subsequent to the ultimate disposition of the initial and original claims which were resolved by the settlement hearing held on September 18, 1995. K.S.A. 1992 Supp. 44-536(g) provides that an attorney is entitled to receive reasonable attorney fees for services rendered in connection with an

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<sup>8</sup> R.M.H. Trans. at 13.

<sup>9</sup> K.S.A. 1992 Supp. 44-536(g).

application for review and modification. Thus, respondent's only stated objection to the attorney fees is without merit. It is appropriate for an ALJ to award attorney fees in connection with a review and modification proceeding.

After the ALJ's October 5, 2005 Order on "Review & Modification" the claimant's attorney sent the ALJ a letter which indicated the parties agreement that the ALJ issue a a Nunc Pro Tunc Order addressing three specific issues.

At the review and modification hearing, the claimant noted that there had really been no change or increase in claimant's disability and instead claimant was requesting reimbursement of out-of-pocket medical expenses and reimbursement of authorized medical expenses. Respondent did not timely object to those issues being addressed at the review and modification hearing. Respondent not only failed to timely object to those issues being determined at the review and modification proceeding but also later agreed to the ALJ addressing those issues in the Nunc Pro Tunc, again without raising the objection that ordering the requested benefits was not proper pursuant to K.S.A. 44-528. This failure to timely object, coupled with respondent's apparent acquiescence at the hearing, defeats respondent's claim. Moreover, there is no prohibition in the review an modification statute against the claimant raising issues regarding medical compensation.

### **AWARD**

**WHEREFORE**, it is the decision of the Board that the October 5, 2005 Order on "Review & Modification" as clarified by the November 15, 2005 Order Nunc Pro Tunc of Administrative Law Judge Robert H. Foerschler are affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant  
John R. Emerson, Attorney for Respondent and its Insurance Carrier  
M. Bradley Watson, Attorney for Workers Compensation Fund  
Robert H. Foerschler, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director